

change of the authorized physician or remand the case back to the ALJ to address the issue.

Respondent agrees with claimant's contention that the issue was "misunderstood" by the ALJ,³ but contends that claimant failed to offer any persuasive *evidence* to substantiate her request for a change of physician as contemplated by the applicable statute. Thus, respondent maintains claimant's request for a change of physician should be denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On April 7, 2005, the parties appeared before the ALJ for a post-award hearing. According to the claimant, she was seeking a change of physician as she was dissatisfied with the treatment being offered by respondent's designated physician, Dr. Roger Hood. Unfortunately, no record of this proceeding was made. Instead, the ALJ relied upon statements of counsel and reviewed medical records, although precisely what records were offered or reviewed is unknown. The ALJ then issued a Decision denying claimant any further surgery to her hip - a request claimant's counsel maintains she did not make.

Both parties agree claimant did not request additional surgery and was only requesting a change of physician as authorized by K.S.A. 44-510(h).

K.S.A. 44-510h(b)(1) states in pertinent part that:

If the director finds, upon application of an injured employee, that the services of the health care provider furnished as provided in subsection (a) and rendered on behalf of the injured employee are not satisfactory, the director may authorize the appointment of some other health care provider. In any such case, the employer shall submit the names of three health care providers who, if possible given the availability of local health care providers, are not associated in practice together. The injured employee may select one from the list who shall be the authorized treating health care provider.

Respondent contends that claimant failed to establish an entitlement to a change of physician primarily because she failed to testify at the hearing, or otherwise come forward with evidence "that the treatment is substandard or inadequate to 'cure and relieve the employee from the effects of the injury.'"⁴

K.S.A. 44-555c(a) confers upon the Board the authority to review "all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and

³ Respondent's Brief at 1 (filed May 19, 2005).

⁴ *Id.* at 2.

fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.” The standard of review for the Board in a workers compensation case is the same as that conferred under prior law upon the District Court. This standard is restated in *Miner*.⁵

The standard of review in workers compensation cases is well settled. Kansas case law allows the district court a trial de novo on the record and, although the court is bound by the agency record, the district court has the jurisdiction and the duty to make an independent adjudication of the facts and the law. *Reeves v. Equipment Service Industries, Inc.*, 245 Kan. 165, 171, 176, 777 P.2d 765 (1989). The district court has full power to grant or refuse compensation and to increase or diminish any award as justice requires. See *Gawith v. Gage’s Plumbing & Heating Co., Inc.*, 206 Kan. 169, 171, 476 P.2d 966 (1970).⁶

In this case, there is no agency record for the Board to review. K.S.A. 44-501(a) provides that the burden of proof is upon the claimant to establish his or her right to an award of compensation. It is also the duty of the aggrieved party to request a record for appellate review purposes. In the absence of a record, the Board has no way of ascertaining what support there is for the ALJ’s factual findings or conclusions, nor is there any feasible method for conducting an independent review of the evidence. The record provided to the Board consists of the parties’ briefs. Briefs assist the Board in defining and focusing on the pertinent facts and law that a party considers significant to the determination of the appeal. However, a brief is not evidence. It is nothing more than a document that states a party’s position on the facts and law pertaining to a specific issue. While it appears uncontroverted that the ALJ issued an order denying a request claimant never made, it is impossible for the Board to conclude whether claimant established an entitlement to a change of physician under K.S.A. 44-510(h).

The Board has the statutory authority to remand this matter to the ALJ with directions to put into evidence that testimony which counsel represented would be forthcoming if a hearing were held and upon which the ALJ based his decision. However, there is no indication in this case that either party was denied the ability to make a record. The failure to request a record at the hearing constitutes a waiver of the right to object to the lack of a record.⁷

As we have said before, the responsibility for making a record rests with the aggrieved party. In the absence of such a request having been made, the Board considers it inappropriate to remand the matter for such proceedings to be conducted at this juncture.

⁵ *Miner v. M. Bruenger & Co.*, 17 Kan. App.2d 185, 188, 836 P.2d 19 (1992).

⁶ *Id.*

⁷ *In re Marriage of Soden*, 251 Kan. 225, 834 P.2d 358 (1992).

Likewise, the Board finds it inappropriate to step in and make a factual finding with respect to a change of physician absent evidence. The claimant's application for review should instead be dismissed for failure to furnish an adequate record, thereby making review by the Board impossible.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Post-Award Decision of Administrative Law Judge Robert H. Foerschler dated April 21, 2005, is dismissed.

IT IS SO ORDERED.

Dated this _____ day of June 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael W. Downing, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director